No. 24-001109

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CRYSTAL STREAM PRESERVATIONISTS, INC.,
Plaintiff-Appellant-Cross-Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and HIGHPEAK TUBES, INC.,
Defendants-Appellees-Cross-Appellants

On Appeal from the United States District Court
for the District of New Union
No. 24-CV-5678

BRIEF OF APPELLEE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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United States Environmental Protection Agency

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STATEMENT OF JURISDICTION

The Court's appellate jurisdiction over this matter is proper pursuant to 28 U.S.C. § 1292(b), given the novel and complex issues raised in the lower court's decision. On August 1, 2024, the district court granted all parties' leave to file this interlocutory appeal. This determination came after its issuance of a Decision and Order entered the same day. (R. 2).

STATEMENT OF THE ISSUES

I. Whether CSP had standing to challenge Highpeak's discharge and the WTR when CSP was formed to initiate this legal challenge and it insufficiently alleged that all or most of its thirteen members have suffered environmental injury.

II. Whether CSP timely filed its challenge to the WTR when the APA provides plaintiffs with a six-year statute of limitations that begins to run after they are truly injured by the promulgated regulation.

III. Whether the EPA's and Highpeak's motion to dismiss CSP's challenge to the WTR should be upheld when the EPA has demonstrated thoroughness in its reasoning and provided extensive consideration of environmental and statutory factors in its promulgation of the WTR.

IV. Whether it should be upheld that Highpeak's discharge is outside the scope of the WTR and subject to permitting under the CWA when the EPA's interpretation of the WTR was reasonable and consistent with the regulation's language and Highpeak's discharge contained pollutants introduced in the course of its water transfer.

STATEMENT OF THE CASE

This is an interlocutory appeal from the United States District Court for the District of New Union. Crystal Stream Preservationists, Inc. ("CSP") filed a Complaint against the United States Environmental Protection Agency ("EPA") and Highpeak Tubes, Inc. ("Highpeak") for the alleged

invalidity of the Water Transfers Rule ("Water Transfer Rule" or "WTR"), challenging the EPA's promulgation of the WTR as inconsistent with the statutory language of the CWA. The district court properly granted the EPA's motion to dismiss CSP's challenge to the WTR and correctly held that Highpeak's practice of introducing additional pollutants in the course of its water transfer takes its discharge outside the scope of the WTR (thus requiring that it obtain a National Pollutant Discharge Elimination System ("NPDES") permit under the CWA). However, the EPA appeals the district court's order because it erred in finding that (1) CSP had standing to challenge the EPA's promulgation of the WTR and (2) CSP's challenge to the WTR was timely filed.

A. Course of Proceedings and Disposition Below

On February 15, 2024, CSP filed a Complaint containing separate claims against the EPA and Highpeak. (R. 3, 5). CSP's claim against the EPA was brought under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, and challenged a regulation promulgated by the EPA known as the NPDES WTR. *Id.* In response to CSP's Complaint, the EPA (1) moved to dismiss CSP's challenge to the WTR, (2) joined Highpeak in challenging CSP's standing and timeliness, and (3) argued that, even though the WTR should be upheld, Highpeak is obligated to obtain a CWA-issued permit for the pollutants introduced in the course of its water transfer. *Id.* at 2, 6. Ceding to CSP's request, the district court refrained from ruling on the pending motions until the Supreme Court could issue its opinions for *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), and *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S.Ct. 2440 (2024). *Id.* at 6. On August 1, 2024, the district court entered a Decision and Order, in which it (1) granted the EPA's and Highpeak's motions to dismiss CSP's challenge to the WTR and (2) denied Highpeak's motion to dismiss CSP's CWA citizen suit cause of action, as well as an Order that granted leave to appeal selected issues. *Id.* at 2, 12.

B. Statement of Facts

Since 1992, Highpeak has owned and operated its recreational tubing facility on a forty-two-acre parcel of land in Rexville, New Union. (R. 4). Around the same time, Highpeak sought and obtained the state's permission to construct a tunnel connecting the bodies of water that surround its northern and southern borders (Cloudy Lake and Crystal Stream ("the Stream" or "Crystal Stream"), respectively). *Id.* According to its agreement with the State of New Union, Highpeak is prohibited from using this tunnel unless Cloudy Lake's water levels are adequate to allow the release of water; this determination is only to be made by the State, but most often occurs due to seasonal rains from spring through late summer. *Id.*

Highpeak's tunnel, partially carved through rock and partially constructed with iron pipe, was self-installed in the same year. (R. 4). The tunnel, approximately four feet in diameter and 100 yards long, is equipped with valves on each end that Highpeak employees open and close. *Id.* In doing so, Highpeak regulates water flow from Cloudy Lake into Crystal Steam with the stated purpose of enhancing tubing recreation by increasing the Stream's volume and velocity. *Id.* Highpeak launches its customers in rented innertubes upon Crystal Stream. *Id.*

On December 1, 2023, CSP was formed as a not-for-profit corporation with thirteen total members, only two of whom owned land along Crystal Stream. (R. 4). These members both moved to their current homes prior to 2008 and reside approximately one mile south of the end of Highpeak's tube run (five miles south of the discharge point). *Id.* All but one of CSP's members, Jonathan Silver, have lived in Rexville for more than fifteen years; Silver moved there in 2019. *Id.* According to CSP, its mission is to "preserv[e] … Crystal Steam in its natural state for environmental and aesthetic reasons." *Id.*

The EPA's authority to issue NPDES permits has been delegated by New Union, since the State's environmental agency has not established its own CWA permitting program. (R. 4). At no time has Highpeak sought or obtained an NPDES permit from the EPA for its discharge of waters from Cloudy Lake into Crystal Stream. *Id.*

On December 15, 2023, Highpeak received a CWA notice of intent to sue letter ("the NOIS") alleging that its tunnel constitutes an Act-regulated point source engaging in the regular and continued discharge of pollutants into Crystal Stream without a permit. (R. 4). As required by 33 U.S.C. § 1365(b)(1)(A), CSP sent copies of the NOIS to the EPA and the New Union Department of Environmental Quality ("DEQ"). *Id.*; *see also* 40 C.F.R. § 135.3 (2023). All parties (CSP, Highpeak, and the EPA) have since stipulated that Cloudy Lake and Crystal Stream are "waters of the United States" under the CWA. (R. 4-5).

Specific allegations in the NOIS were supported by sampling results showing that Highpeak's discharge contains multiple pollutants. (R. 5). Compared to the water in Crystal Stream, Cloudy Lake's water has significantly higher levels of iron and manganese (as well as other minerals) and a much higher concentration of total suspended solids ("TSS"). *Id.* Although these differences have been determined to exist as the result of natural conditions, CSP alleges that Highpeak violates the Act every time it opens the valves, subsequently discharging pollutants into the Stream on every occasion. *Id.* The NOIS additionally alleges that additional iron, manganese, and TSS introduced in the course of Highpeak's water transfer take it out of the exemption provided by the WTR, thereby requiring that it obtain an NPDES permit from the EPA. *Id.* CSP's data indicated that Highpeak's discharge into Crystal Stream contains approximately 2-3% higher concentrations of these pollutants when compared to water samples taken directly from Cloudy Lake on the same day. *Id.*

Highpeak's reply letter to CSP stated that (1) it need not respond to the NOIS on the merits, claiming that the WTR renders it exempt from the NPDES permit requirement, and (2) its discharge is not taken outside the scope of the WTR since the pollutants introduced in the course of its water transfer are "natural" additions. (R. 5). Following the required sixty-day waiting period, CSP's Complaint, reiterating all allegations included in its NOIS, was filed on February 15, 2024. *Id.* Along with CSP's citizen suit against Highpeak, this Complaint also challenged the EPA in alleging that, under the APA, the WTR is invalidly promulgated and inconsistent with the CWA's statutory language. *Id.*

In April 2024, the district court ceded to CSP's request that it refrain from ruling on the pending motions of this case until the Supreme Court could issue rulings on *Loper Bright Enterprises v. Raimondo* and *Corner Post, Inc. v. Board of Governors of Federal Reserve System*. (R. 6); 144 S.Ct. 2244 (2024); 144 S.Ct. 2440 (2024). CSP argued that these decisions could provide additional legal foundation for the corporation's claims. (R. 6).

The district court granted the EPA's and Highpeak's motion to dismiss CSP's challenge to the WTR but denied the motion to dismiss CSP's CWA citizen suit cause of action against Highpeak. (R. 6, 12). Following the issuance of a Decision and Order, each party filed a motion seeking leave to appeal various parts of the district court's holding. *Id.* at 2. The motions for leave to file interlocutory appeals were granted, given the novel and complex issues raised here. *Id.*

C. Standards of Review

This Court reviews *de novo* an interlocutory appeal arising from issues of law raised in a district court's decision. 28 U.S.C. § 1292(b). Again, this Court owes no deference to the lower court in determining whether the district court properly ruled on the parties' motions to dismiss under Fed. R. Civ. P. 12(b)(6). *See U.S. Bank Nat. Ass'n ex rel. CWCap. Asset Mgmt. LLC v. Vill.*

at Lakeridge, LLC, 583 U.S. 387, 388 (2018); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 227-28 (2020). Under Fed. R. Civ. P. 12(b)(6), a motion to dismiss shall be granted when a pleading contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In a motion to dismiss for want of standing under Fed. R. Civ. P. 12(b)(1), "all material allegations of the complaint" must be accepted as true and "construe[d] … in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). However, a court "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Tyler v. Hennepin Cnty., Minn.*, 598 U.S. 631, 636 (2023).

SUMMARY OF THE ARGUMENT

I. The Court should reverse the district court's judgment in denying the EPA's motion to dismiss CSP's citizen suit and regulatory challenge for lack of standing. Because CSP was created entirely for the purpose of challenging the validity of the WTR and Highpeak's decade long practices, it has not suffered a constitutionally cognizable injury. Further, such a cause of action may not be created by the mere formation of a nonprofit and the "conclusory allegations of an affidavit" or two. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). CSP lacks constitutional standing because its members cannot show (among other elements) that they suffered a true and cognizable injury at the hands of either defendant, the EPA or Highpeak. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010).

II. The Court should reverse the district court's judgment in denying the EPA's motion to dismiss CSP's challenge to the WTR on the basis that it was not timely filed. Not only did the members of CSP lack true harm, they also illegitimately masqueraded their bad faith intent in bringing these claims as harm. Under 5 U.S.C. § 702, the APA grants an equitable cause of

action against the federal government for the actions of an administrative agency with a default statute of limitations "within six years after the right of action first accrues." *See also* 28 U.S.C. § 2401. CSP has failed to timely bring its claim against the EPA, seeing as its members must have done so within the statute of limitations that began to run when they have been injured (rather than when the rule was finalized). *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S.Ct. 2440, 2450 (2024). In *Corner Post*, the Supreme Court discussed the potential danger of "gamesmanship" that arises under this accrual rule, in which self-interested individuals contrive agency harm where there is none in order to target regulatory rules. *Id.* at 2471 n.1 (Jackson, J., dissenting). Courts have, accordingly, expressed their disapproval toward parties using deceitful artifice to circumvent deadlines or statues of limitations, an illusory practice that resembles CSP's in bringing these claims. *See, e.g., Garrett v. Wexford Health*, 938 F.3d 69, 89 (2019).

III. The Court should affirm the district court's judgment in granting the EPA's motion to dismiss CSP's challenge to the WTR, a valid regulation promulgated under the CWA that is not arbitrary, capricious, or contrary to law. Regardless of *Loper Bright*'s recently developed "interpretive methodology," it does not allow for the reconsideration of past cases applying *Chevron*'s framework. *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2273 (2024). Therefore, because "[m]ere reliance on *Chevron* cannot constitute a special justification for overruling such a holding," this newly decided case law does not affect the sustained validity of the WTR. *Id.* Even under *Skidmore*'s less deferential standard, the WTR shall still be upheld, and the district court's dismissal of CSP's challenge to the WTR remains proper regardless of which standard is applied.

IV. The Court should affirm the district court's judgment in denying Highpeak's motion to dismiss CSP's citizen suit against it, since Highpeak's discharge contains pollutants introduced during its water transfer (thus requiring an NPDES permit) and is not exempt under the EPA's interpretation of the WTR. The WTR clarifies that its "exclusion [from the CWA-imposed requirement to obtain an NPDES permit for any] does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i)(2023). Seeing as the addition of pollutants introduced in the course of Highpeak's water transfer is outside the scope of the exemption as interpreted by the EPA, the Act prohibits Highpeak from engaging in the discharge or any pollutant without first obtaining a permit. 33 U.S.C. § 1311(a). Under the *Auer* standard, the EPA's interpretation of its own regulation, as well as the exception that accompanies it, demands the highest level of deference. Even if it were not for respect of the EPA's interpretation, it has also been evidenced by the CWA's purpose and case law that this outcome shall be supported.

ARGUMENT

I. The district court erred in holding that CSP had standing to challenge the WTR and bring the CWA citizen suit because its members did not suffer sufficient injury.

The Twelfth Circuit Court of Appeals should reverse the judgment of the district court in denying the EPA's motion to dismiss for lack of standing. CSP was created entirely for the purpose of challenging the validity of the WTR and Highpeak's decade long practices. However, the creation of a nonprofit and the "conclusory allegations of an affidavit" or two does not create a constitutionally cognizable injury. *Nat'l Wildlife Fed'n*, 497 U.S. at 888. In other words, activist plaintiffs "may not manufacture standing merely by inflicting harm on themselves." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-14 (2013).

Before bringing a case, Article III of the Constitution "requires a plaintiff to first answer a basic question: 'What's it to you?'" *FDA v. All. for Hippo. Med.*, 602 U.S. 367, 379 (2024). This fundamental doctrine, called Article III standing or constitutional standing, ensures that the parties have a real stake in the litigation, and aren't just uninvolved individuals seeking to litigate issues in the abstract. *Clapper*, 568 U.S. at 408. Among other elements, plaintiffs must show that they suffered a true and cognizable injury at the hands of the defendant. *Monsanto*, 561 U.S. at 149.

A. CSP lacks a cognizable injury in fact.

Article III standing has three elements: injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action, and redressable by a favorable ruling." *Monsanto*, 561 U.S. at 149. "Concrete" is defined as being a true violation of a legal interest, and not simply a violation in the abstract. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). The concrete and particularized element is often called the "injury in fact." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560. "Actual and imminent" refers to harms that are not "conjectural" or hypothetical." *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990).

1. CSP's allegations of harm are not concrete.

An artificially created injury self-imposed by a plaintiff with improper motivations is not sufficient to meet the concreteness element of Article III standing. The Supreme Court clarified in *Spokeo* that "a 'concrete' injury must be *'de facto:'* that is, it must actually exist." 578 U.S. at 340. Specifically, it held that the violation of a statute or a statutory right is not necessarily sufficient to satisfy the "concreteness" element of Article III standing. *Id.* at 341 (stating that "Article III standing requires a concrete injury even in the context of a statutory violation"). This reasoning was furthered by *TransUnion LLC v. Ramirez*, where the court drew "an important difference" between a plaintiff's statutory cause of action and that plaintiff's concrete harm, noting that "under

Article III, an injury in law is not an injury in fact." 594 U.S. 413, 427 (2021). A plaintiff's intent, however morally justified, to assure "compliance with regulatory law" does not standing make. *Id.* (quoting *Spokeo*, 578 U.S. at 345 (Thomas, J., concurring)). "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *TransUnion*, 594 U.S. at 427 (quoting *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019)).

A plaintiff "cannot manufacture standing merely by inflicting harm on themselves." *Clapper*, 568 U.S. at 410-411. In *Stoops v. Wells Fargo Bank*, a litigious professional plaintiff created a "business" out of bringing lawsuits under the Telephone Consumer Protection Act ("TCPA"), a federal law designed to protect consumers from unwanted and harassing calls. 197 F. Supp. 3d 782, 798-99 (W.D. Pa. 2016) (quoting plaintiff as saying "I have a business suing offenders of the TCPA . . . It's my business. It's what I do"). It is undisputed in this case that this professional plaintiff purchased over 30 cell phones that were explicitly bought "in order to manufacture a TCPA" lawsuit. *Id.* The court held that because the plaintiff bought the phones solely for bringing TCPA lawsuits, she had not suffered a cognizable injury for constitutional standing purposes. *Id.* at 800 (citing *Clapper*). In other words, the plaintiff alleged no actual harm caused by the defendants and sought to fabricate an injury for no other reason than to sue. *Id.*

Similarly, the Supreme Court recently took up a case involving an Americans with Disabilities Act ("ADA") "tester," to address constitutional standing. *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2024).[1] Deborah Laufer, a disabled wheelchair user, is a self-described ADA

[1] The Supreme Court dismissed the case as moot. *Acheson Hotels, LLC v. Laufer*, 601 U.S. at 22. However, a concurring opinion argued that the court should address the standing issue, and that *Laufer* lacked Article III standing. *Id.* (Thomas, J., concurring in the judgment).

"tester," or advocate that brings lawsuits against businesses for ADA violations, including businesses they have never visited. *Laufer v. Looper*, 22 F.4th 871, 874-75 (10th Cir. 2022).

In a 10th Circuit Case, Laufer conceded that she had no set plans to visit the Elk Run Inn (the hotel owned by the Looper defendants), or even the city where the Inn was located. *Looper*, 22 F.4th at 877-88. Laufer unsuccessfully argued that she received a constitutional injury when she discovered that the Elk Run Inn was noncompliant with a federal regulation, ignoring *Spokeo*.[2] The 10th Circuit demonstrated that violation of federal law alone was not sufficient to render constitutional standing, and that if the plaintiff suffered no true injury outside of that, then they lacked standing to sue. *See id.*

Here, CSP lacks a concrete injury sufficient for constitutional standing. CSP pleads no true injury, outside of an allegation that Highpeak violated the CWA. (R. 4); *TransUnion,* 594 U.S. at 27. Instead, CSP was formed solely to "manufacture" an injury so that a lawsuit could be brought. (R. 6-7); *Clapper*, 568 U.S. at 410-411.

The facts in this case are substantially similar to those in the *Stoops* case. In both situations, an organization was founded specifically to induce harm in order to bring a lawsuit. (R. 6); *Stoops*, 197 F. Supp. 3d at 798-99. The plaintiff in *Stoops* purchased dozens of cell phones in an attempt to self-inflict constitutional harm; *Stoops*, 197 F. Supp. 3d at 798-99. CSP scrounged up a few residents willing to sign a declaration citing vague aesthetic and environmental harm. (R. 14-17). Both plaintiffs lack a true and concrete injury, because they had no real stake in the outcome of the litigation.

[2] Although *TransUnion* was binding on the 10th Circuit case, the *TransUnion* opinion was released after Laufer's trial at the district level. *Laufer v. Looper*, No. 20-cv-02475-NYW, 2021 WL 330566 (D. Colo. Jan. 11, 2021); *TransUnion*, 594 U.S. 413 (2021) (released June 25, 2021).

The *Looper* case presents another strong parallel. In that case, the plaintiff sought to assert injury under the ADA, even though she had not ever planned on visiting the city of the hotel that she sued. *Looper,* 22 F.4th at 877-78. She simply wanted to act as a private attorney general and ensure compliance with federal law. *Id.* Even if her motives were justified, her injury was not concrete. *Id.* at 879. In the current case, instead of visiting a website to claim injury, CSP was formed under the laws of New Union to claim injury. (R. 6-7); *Looper*, 22 F.4th at 879. The result, though, remains the same: violation of federal law and intent to enforce it alone does not give a private individual concrete harm. (R. 6-7); *Looper*, 22 F.4th at 879.

2. CSP's allegations of harm are not actual or imminent.

Although courts do allow allegations of future harm to establish standing, "'[a]llegations of *possible* future injury' are not sufficient" to establish Article III standing. *Clapper*, 568 U.S. at 409 (quoting *Whitmore*, 495 U.S. at 158). A plaintiff must show that the injury is "certainly impending" and not speculative in nature. *E.g.*, *Defs. of Wildlife*, 504 U.S. at 564 n.2. At the motion to dismiss stage, a court must take all allegations as true, but it "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Tyler*, 598 U.S. at 636; *Whitmore*, 495 U.S. at 155-56.

In *Defenders of Wildlife*, two women who had previously traveled to foreign countries to view those areas' endangered species filed a lawsuit attacking a regulatory rule. 504 U.S. at 563. Both women submitted affidavits expressing desire to return to the areas featuring the endangered species. *Id.* The Supreme Court found that "'some day' intentions [to return to a location] – without any description of concrete plans . . . do not support a finding of the 'actual or imminent' injury that our cases require." *Defs. of Wildlife*, 504 U.S. at 564 (conjecturing that "'soon' means nothing more than 'in this lifetime'").

Here, CSP alleges nothing close to "certainly impending" harm. *Clapper*, 568 U.S. at 401. *Defs. of Wildlife*, 504 U.S. at 564 n.2. Their facts of this case are strongly analogous to the facts in the operative case, *Lujan v. Defenders of Wildlife*. In *Defenders of Wildlife*, where two individuals wrote affidavits expressing an amorphous desire to return to the habitats of certain endangered species. 504 U.S. at 564. In the current case, two individuals wrote declarations expressing an amorphous desire to return to Crystal Stream. (R. 15 at ¶ 12; 16 at ¶ 9). The declarations are a plea of speculative future harm which is not sufficient for constitutional standing. (R. 15 at ¶ 12; 16 at ¶ 9); *Clapper*, 568 U.S. at 409. Although this court must take the facts at the motion to dismiss as true, it cannot accept the vague "some day" intentions of the organization members as sufficient for standing. *Tyler,* 598 U.S. at 636; *Defs. of Wildlife*, 504 U.S. at 564.

3. CSP's allegations of harm are not continuing or certainly impending.

The injury in fact element of the standing analysis for monetary damages is different from the standard for equitable relief. *L.A. v. Lyons*, 461 U.S 95, 105 (1990); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Specifically, a plaintiff must show continuing harm, or that the purported injury is very likely to occur in the future to that individual plaintiff in the same manner as alleged. *O'Shea*, 414 U.S. 488 at 496-97; *Lyons*, 461 U.S. at 105 (holding that a police chokehold was unlikely to occur to the same plaintiff, depriving him of standing for injunctive relief). The potential for the alleged injury to occur again must be "a real and immediate threat" and must be "certainly impending." *Clapper*, 568 U.S. at 401 (strongly rejecting an "objectively reasonable likelihood" standard). Additionally, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *O'Shea*, 414 U.S. at 495.

Much as above, CSP alleges nothing close to a "certainly impending" injury. *Clapper*, 568 U.S. at 401. CSP's undefined "some day" intentions are not sufficient for the imminent prong of

standing in general, let alone for injunctive relief. *Defs. of Wildlife*, 504 U.S. at 564. The declarations of CSP members track almost exactly with the *Defenders of Wildlife* plaintiffs: a speculative and vague desire which if fulfilled *may* render a sufficient injury. 504 U.S. at 563; (R. 15 at ¶ 12; 16 at ¶ 9). Additionally, CSP's conclusory allegations have shown no continuing or harm that is substantially likely to occur in the same manner. (R. 15 at ¶ 12; 16 at ¶ 9); *O'Shea*, 414 U.S. 488 at 496-97; *Lyons*, 461 U.S. at 105. Just as the plaintiff in *Lyons* could not show that the chokehold used against him was substantially likely to occur to him again, CSP cannot show that Highpeak will add the same amount or percentage of pollutants as they previously alleged. (*See* R. 5). CSP has *alleged* that Highpeak violated the CWA during its water transfer, but past violation of the law is not sufficient to warrant standing for injunctive relief. (R. 5); *O'Shea*, 414 U.S. at 495.

B. CSP lacks prudential standing to sue.

Prudential standing is another form of standing that flows not from the Constitution, but from a judicial desire for restraint and discretion. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). Prudential standing takes many forms, such as the "deeply rooted" dedication to avoid ruling on Constitutional issues, unless it is absolutely necessary. *Id.* at 11. Prudential standing also covers, among others, the prohibition against generalized grievances more appropriate for legislative and executive involvement. *Id.* at 12. The bar against generalized grievances holds to avoid addressing matters of wide public interest and import in the judiciary, which is more suited to narrow and intimate findings. *Defs. of Wildlife*, 504 U.S. at 575 (holding that "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive").

In *Defenders of Wildlife*, the Supreme Court found that a vague and undefined allegation of environmental injury under the Endangered Species Act, specifically the denial of opportunities to view certain endangered species, flouted the Court's commitment to principles of judicial prudence. *Id.* Plaintiffs in environmental cases are commonly found to lack prudential standing. *E.g. id.*; *Fitzgerald Reno, Inc. v. U.S. Dept. of Transp.*, 60 Fed. App'x 53, 53 (9th Cir. 2003) (finding plaintiffs lacked prudential standing under National Environmental Policy Act); *W. Wood Preservers Inst. v. McHugh*, 925 F. Supp. 2d 63, 73-74 (D.D.C. 2013) (finding the same); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 179 (D.D.C. 2012) (finding that plaintiffs lacked prudential standing under Clean Air Act). *See also* Michael A. Perino, Comment, *Justice Scalia: Standing, Environmental Law and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135, 144 (1987) (discussing conflict between standing and environmental law issues).

In this case, the claim is the exact type of issue that is better left resolved by Congress and the Executive. CSP brought this lawsuit specifically to adjudicate not just one, but *three* constitutional issues. (R. 6-12); *Elk Grove*, 542 U.S. at 11. However, the court need not and should not proceed to other matters of weighty importance, simply because CSP lacks standing to sue in the first place. *Elk Grove*, 542 U.S. at 11. CSP also seeks to "vindicate the public interest" in Crystal Stream via the judicial branch rather than its proper place, the legislative and executive. (R. 4-5); *Defs. of Wildlife*, 504 U.S. at 575. This case, much like many other environmental law cases, lacks prudential standing for want of non-judicial resolution. *See, e.g.*, *Defs. of Wildlife*, 504 U.S. at 577; *Fitzgerald Reno,* 60 Fed. App'x at 53; *W. Wood Preservers*, 925 F. Supp. 2d at 73-74; *Grocery Mfrs. Ass'n*, 693 F.3d at 179; Perino, *supra* at 144.

C. CSP lacks associational standing to sue.

Associations can bring lawsuits on behalf of their members if (1) its members would otherwise have standing to sue on their own, (2) the interests the association seeks are germane to their purpose, and (3) neither the claim asserted nor the relief sought requires the participation of individual association members in the lawsuit. *Hunt,* 432 U.S. 333, 343-44. Although the purpose and experience of the organization is relevant to establishing standing, an association with "a mere 'interest in a problem' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, it is not sufficient" to grant standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *see also All. for Hippo. Med.*, 602 U.S. at 381 (2024). To allow otherwise would allow a legally uninjured party to artificially create an injury simply because "the actions are personally displeasing or distasteful to them. *Sierra Club*, 405 U.S. at 731. An organization also may not "sue merely because their legal objection is accompanied by a strong moral, ideological, or policy objective." *All. for Hippo. Med.*, 602 U.S. at 381. Associational standing exists to follow the fundamental purpose of standing that the parties have a stake in the litigation. In *Sierra Club*, the Sierra Club, "a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's predations" was still not sufficiently injured by only the nature of their experience and interest. *Sierra Club*, 405 U.S. at 739.[3]

The third prong of this test refers to whether a fact-intensive inquiry regarding the claim or *relief* is required to be conducted in order to demonstrate standing. *Hunt v. Wash. State Apple Advert. Com'n*, 432 U.S. 333, 343-44 (1977); *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex.*

[3] To say "long-established" is somewhat of an understatement. *Sierra Club*, 405 U.S. at 739. The Sierra Club has been active since 1892. *Historical Accomplishments*, SIERRA CLUB, https://www.sierraclub.org/accomplishments.

Med. Bd., 627 F.3d 547 (5th Cir. 2010). In one case, the Tenth Circuit determined that an organization lacked associational standing when the court would have required significant evidence specific to each association member in order to resolve the issue. *Kan. Health Care Ass'n v. Kan. Dept. of Soc. and Rehab. Servs.*, 958 F.3d 1018, 1022 (1922).

Here, CSP lacks associational standing, because mere interest in a particular issue is not sufficient for standing "no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem." *Sierra Club*, 405 U.S. 727 at 739. CSP's 11-month infancy and the dubious timing of its formation can be contrasted with the Sierra Club's profound and 132-yearlong commitment to environmental protection. (R. 4-6); *see Sierra Club*, 405 U.S. at 739. Yet the Sierra Club still lacked standing based on their great depth of experience. *See Sierra Club*, 405 U.S. at 739; *see also Historical Accomplishments, supra* n.1.

CSP also cannot meet the third prong of the *Hunt* associational standing test. The claim that CSP makes that Highpeak is polluting Crystal Stream with pollutants such as iron and manganese does not require a fact-intensive inquiry. (R. 4-5); *Ass'n of Am. Physicians,* 627 F.3d at 547. However, the relief pleaded by its very nature would require a thorough factual analysis. *Kan. Health*, 958 F.3d at 1022. The plaintiff seeks injunctive reform, specifically in the case of preventing Highpeak from transferring water from Cloudy Lake into Crystal Stream. (R. 4). One CSP member cites levels of iron and manganese specifically as a concern, and the other CSP declarant states generally that he is worried about "toxic chemicals." (R. 14 at ¶ 9). However, in order to determine what those "toxic chemicals" are and reduce the amount of those discharges from the water, extensive testing would have to be conducted about the relative levels within each body of water. If an injunction ordering the decrease in discharges of certain substances were issued, testing of both Cloudy Lake and Crystal Stream would be necessary in order to ensure

compliance. Since the two CSP declarants fail to state the same specific grievance, two different factual investigations would be necessary to determine each declarant's proper relief. Since the claims are so specific to each declarant, CSP cannot properly invoke associational standing. *Kan. Health*, 958 F.3d at 1022.

CSP cannot show constitutional standing, because their allegations of harm are not concrete, actual and imminent, or clearly impending. Additionally, CSP lacks prudential standing because their grievance is better addressed by the legislature and executive. Lastly, CSP lacks associational standing, because their mere interest in a problem does not constitute standing, and also their desired relief would require a deeply factual inquiry.

II. The district court erred in holding that CSP members filed a timely action under the APA because they lack true harm and masqueraded their bad faith intent as harm.

The Twelfth Circuit Court of Appeals should reverse the judgment of the district court in denying the EPA's motions to dismiss for untimeliness. The APA enables a civil action to be brought against the United States for a "person suffering legal wrong because of agency action." 5 U.S.C. § 702. In effect, it grants an equitable cause of action against the federal government for the actions of an administrative agency with a default statute of limitations "within six years after the right of action first accrues." *Id.;* 28 U.S.C. § 2401. The U.S. Supreme Court held that the right of action accrues, and therefore the statute of limitations begins to run, when the plaintiff is *injured* rather than when the rule is finalized. *Corner Post*, 144 S.Ct. at 2450.

The dissent in *Corner Post* discusses the potential danger of "gamesmanship" under the *Corner Post* accrual rule. 144 S.Ct. at 2470-71 (Jackson, J., dissenting). In other words, the dissent correctly fears that self-interested people will contrive agency harm where there is none solely to target regulatory rules. *Id.* at 2471 n.1. The dissent is correct in fearing gamesmanship, but the facts of *Corner Post* do not rise to that level. In 2021, 10 years after a properly promulgated rule

regarding debit card interchange fees, two large and long-standing retail trade associations sued under the APA targeting this rule. *Id.* The government moved to dismiss the lawsuit under the Eighth Circuit (and majority) rule that the 6-year statute of limitations begins running when a rule is promulgated. *Id.* Corner Post, Inc., a truck stop and convenience store that began operating in 2018, was joined as a party. *Id.* After losing at the district court and the Eight Circuit, Corner Post, Inc. won at the Supreme Court, who adopted the rule that the statute of limitations under the APA began running when the plaintiff was *injured*. *Id.* at 2443 (majority opinion). However, Corner Post, Inc. was not trying to circumvent the statute of limitations, because it was a duly operated and legitimate business that had been experiencing harm from the interchange fee rule for 3 years. *Id.* Corner Post existed outside of the purpose of monitoring and targeting agency action, so their injury was genuine. *Id.*

Courts have expressed disapproval of parties using deceitful artifice to circumvent deadlines or statutes of limitations. *See, e.g., Garrett*, 938 F.3d at 89 (finding that Rule 15's relation back doctrine prevents litigants from trying to "game the system" by . . . causing prejudice to a defendant's validly raised defenses). In *People v. Stanfill*, a state appeals court discussed "gamesmanship," in the context of a criminal defendant who was silent on a statute of limitations defense, only to later raise that issue on appeal and plead undue prejudice. 76 Cal. App. 4th 1137, 1146, 1148-49 (Cal. Ct. App. 1999). The Court held that this "gamesmanship" rendered forfeiture of the statute of limitations defense. *Id.* at 1148-50. Most notably, the Southern District of New York found in *Carson v. Northwell Hosp.* that a party had likely used manipulative tactics to take advantage of a statute of limitations deadline. No. 20 CV 9852 (LAP), 2022 WL 1304453 at *2 (S.D.N.Y. May 2, 2022). Specifically, the defendant was silent on statute of limitations defense during all of discovery and the days-long drafting of a pre-trial order that it conducted with the

plaintiff, only to assert that defense mere hours before the pre-trial order was docketed. *Id.* at *2. The Court subsequently found "some degree of intentionality" in the defendant's actions and ruled against them on the statute of limitations issue, noting the party's bad faith intent as a significant factor. *Id.*

Here, CSP clearly looks less like Corner Post, Inc. and more like the defendant in *Carson*. For one, CSP "was not formed until the Supreme Court took up . . . *Corner Post*." (R. 6). Every member of the organization except one has lived near Crystal Stream for over 15 years; that one has lived there for 5 years. (R. 4). However, no member ever brought an APA action in the years or decades in which they lived near Crystal Stream. (R. 4, 8.) Declarant Jones, the Secretary of CSP, has lived 400 yards from Crystal Stream for 27 years, but seemingly only just now began to worry about Highpeak's decades-long practices. (R. 14 at ¶¶ 3-5, 9). She claims to have "regularly walked along the stream" for the last 27 years, but "[r]ecently" decided that the WTR was responsible and that something must be done about it. (R. 15 at ¶¶ 7-8).

Clearly CSP was formed to challenge the WTR, since before *Corner Post*, the action would have been time-barred. *Corner Post*, 144 S.Ct. at 2443. This is substantially similar to the criminal defendant in *Stanfill* intentionally refusing to expressly waive a statute of limitation only to strategically use that later, or the party in *Carson* that manipulated the litigation timeline to suit their own ends. 76 Cal. App. 4th at 1146, 1148-49; 2022 WL 1304453 at *2. In both cases, the courts found that the bad faith intent of the parties contributed to the adverse ruling on the statute of limitations issue. *See Stanfill*, 76 Cal. App. 4th at 1148-50; 2022 WL 1304453 at *2. CSP's intent is clear: to challenge the WTR. (R. 8; 14 at ¶¶ 2, 4; 16 at ¶¶ 6-9). This court should follow the guidance of *Stanfill* and *Carson*, because other courts should and do reject the contentions of parties engaging in bad faith and "gamesmanship" concerning statutes of limitations, like CSP

here. (R. 8; 14 at ¶¶ 2, 4; 16 at ¶¶ 6-9); *See Stanfill*, 76 Cal. App. 4th at 1148-50; *Carson,* 2022 WL 1304453 at *2. Essentially, because CSP has engaged in manipulative "gamesmanship," they have alleged no true injury under the APA. 144 S.Ct. at 2470-71 (Jackson, J., dissenting). Because CSP alleges no true injury under the APA, their claim should be dismissed.

III. The district court correctly upheld the WTR as a valid regulation under the CWA because it is not arbitrary, capricious, or contrary to law.

The Twelfth Circuit should affirm the district court's judgment that the WTR is a valid regulation promulgated under the CWA. Despite the shift in "interpretive methodology" in *Loper Bright*, the WTR remains valid because *Loper Bright* does not allow for the reconsideration of prior cases that applied the *Chevron* framework. *Loper Bright*, 144 S.Ct. at 2273. And "[m]ere reliance on *Chevron* cannot constitute a special justification for overruling such a holding." *Id.* Additionally, even under the less deferential standard of *Skidmore*, the WTR should be upheld. Thus, the district court's grant of the EPA's motion to dismiss CSP's challenge to the WTR was proper.

A. *Loper Bright* explicitly clarified that regulations previously upheld under *Chevron* remain valid under principles of stare decisis.

Even with *Loper Bright* overruling *Chevron* deference, the decision carefully preserved stability within the legal system by clarifying that past rulings remain intact and unaffected. Specifically, the Court held "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory stare decisis despite [its] change in interpretive methodology." *Loper Bright*, 144 S.Ct. at 2273. So, *Loper Bright* permits new challenges to future agency actions interpreting statutes but prohibits re-litigating issues previously resolved under *Chevron* deference. As such, the Twelfth Circuit must adhere to existing precedents.

This is especially true for statutory interpretation, where the principle of stare decisis is applied with greater rigidity. *See Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015) (stating that "stare decisis carries enhanced force when precedent interprets statute, because. . . Congress can correct any mistake it sees in that precedent"); *Hubbard v. U.S.*, 514 U.S. 695, 711 (1995) (holding that the "[r]espect for precedent is strongest in the area of statutory construction, where Congress is free to change this Court's interpretation"). This greater adherence persists even when it means "sticking to some wrong decisions" because stare decisis rests on the principle that "it is usually more important that the applicable rule of law be settled than that it be settled right." *Kimble*, 576 U.S. at 455.

Moreover, lower courts are not empowered to conclude that the Supreme Court's recent cases have implicitly overruled earlier precedent. *Bosse v. Okla.*, 580 U.S. 1, 3 (2016) (reasoning that lower courts' "decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality"). What's more, even if the Court's prohibition in re-litigating issues previously resolved under *Chevron* deference "could be plausibly characterized as *dicta*," lower courts are not at liberty to simply ignore the Supreme Court's directives, nor can they "pick and choose among them as if ordering from a menu." *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008).

Here, the Twelfth Circuit is not to revisit the validity of WTR following *Loper Bright* because the ruling did not overturn prior *Chevron*-based decisions. Akin in *Bosse*, the Twelfth Circuit is not to assume *Loper Bright* implicitly invalidates regulations previously reviewed under both *Skidmore* and *Chevron*. *Bosse*, 580 U.S. at 3. And, while the statutory interpretation of the WTR may have been previously at issue, the agencies' formal interpretation under *Chevron* deference was thoroughly scrutinized and ultimately upheld in *Catskill III* after extensive judicial review.

Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492, 525 (2nd Cir. 2017) (*Catskill III*); *see also Friends of Everglades v. S. Fla. Water,* 570 F.3d 1210, 1228 (11th Cir. 2009) (holding "[t]he EPA's regulation adopting the unitary waters theory is a reasonable, and therefore permissible, construction of the [CWA]"). The plain language of *Loper Bright* clearly focuses on regulations that have not been previously challenged and upheld. Accordingly, even if characterized as dicta, *Loper Bright* precludes *Catskill III* from being overruled solely due to the Court's shift in "interpretive methodology." *Surefoot LC.*, 531 F.3d at 1243. Thus, the validity of the WTR remains settled as established in *Catskill III*.

B. The prior precedent set in *Catskill III* shall be given judicial deference because there is no special justification present that would undermine the precedent.

Even if *Loper Bright* calls into question the decisions upholding the WTR, there is no special justification that would warrant a lower court to not respect *Catskill III's* prior ruling. *Loper Bright* made it clear to the litigants seeking to challenge settled statutory interpretations that "[m]ere reliance on *Chevron* cannot constitute a special justification for overruling such a holding." *Loper Bright*, 144 S.Ct. at 2273. This basis, the Court said, would "at best," be "just an argument that the precedent was wrongly decided." *Id.* And this, as the majority concluded, is "not enough to justify overruling a statutory precedent." *Id.*

Courts have historically continued to adhere to precedent, even in the face of heavy criticism, due to the principle of stare decisis. "Principles of stare decisis, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008); *see also, John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 139 (2008). In *Kimble*, the Supreme Court declined the opportunity to overrule prior precedent set in *Brulotte* because the Court found no special justification to abandon it. *Kimble*, 576 U.S. at 2415. The court noted that Congress had not acted to change this rule in the years since set in

Brulotte, and stare decisis carried enhanced force for this statutory interpretation. *Id.* at 2409. Secondly, the Court also found that the statutory and doctrinal basis of *Brulotte* had not weakened over time since the decision relied upon the remaining patent law principle (patents expiring after a set term), leading to the conclusion that charging royalties beyond the life of a patent was impermissible. *Id.* at 2411. Thirdly, the Court found "nothing about *Brulotte* to be unworkable" and continuing such precedent would bring legal stability upon which the rule of law depends. *Id.* at 459.

Here, *Catskill III* warrants the same respect as *Kimble*. Just as in *Kimble*, Congress has remained silent in addressing the permit requirements for water transfers. Notably, in more than 40 years of permitting history, the EPA has never regulated water transfers, and Congress, despite having the authority to amend this interpretation of the law, has chosen not to intervene or require permits. *Catskill III*, 846 F.3d at 525. Also like in *Kimble* where the statutory and doctrinal basis remain true, *Catskill III's* basis for validating WTR is consistent with the continued purpose of CWA. The Act's emphasis on "cooperative federalism" to manage "the nation's water resources" was the foundation for the conclusion in *Catskill III* as the WTR allows the states to have primary responsibilities and rights to allocate quantities of water within their jurisdiction. *Id*. at 502; *see also S. Side Quarry, LLC v. Louisville & Jefferson Cnty. Metro. Sewer Dist.,* 28 F.4th 684, 690 (6th Cir. 2022). Finally, the *Catskill III* decision remains entirely workable, much like *Brulotte*, by enabling states to manage water rights without the need for NPDES permits for water transfers. *Id*. at 524. Thus, in the absence of a special justification, *Catskill III* holding remains a valid and stable interpretation of the CWA.

C. The WTR would still be upheld under the *Skidmore* standard.

Even under the less deferential standard of Skidmore, the WTR would still be held as valid. *Skidmore* instructs that "the rulings, interpretations and opinions" of an agency may form "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994). The appropriate level of deference given to an agency's interpretation of a statute under the *Skidmore* standard depends on the interpretation's "power to persuade," which is influenced by factors such as ″the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Id*.

1. It is evident that the EPA's interpretation was developed with thorough consideration.

The EPA's rationale for the WTR rested on a holistic interpretation of the CWA and is thoroughly evident by the statutory language and Supreme Court rulings. Under the Act, a "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source" but notably lacks the modifier "any" before the term "navigable waters." 33 U.S.C. § 1362(12). "[N]avigable waters" are then defined as "the waters of the United States." 33 U.S.C. § 1362(7). Together, these definitions establish that an NPDES permit is required only when pollutants are discharged through a point source into United States waters and clarifies that pollutants cannot be "added" once they are already within "the waters of the United States." *Id*.

The Supreme Court's rulings supply evidence to this interpretation. In *Rapanos*, the Court clarified the definition of "navigable waters" under the CWA by closely analyzing the phrase "the waters of the United States." *Rapanos v. U.S.*, 547 U.S. 715, 732 (2006). By including the definite article "the" before "waters," the Court emphasized that the law refers to specific, substantial bodies of water, and not to any small or temporary water presence like puddles or intermittent

streams. *Id*. This ruling effectively established boundaries on what qualifies as navigable waters under the CWA, indicating that federal jurisdiction does not extend to all water bodies. *Id.* At the same time, the creation of such boundaries means that classifying "the waters of the United States" as belonging to a single category aligns with the "unitary waters" theory, treating the classification as a unified whole. *Id*. Thus, the Court's interpretation reinforces that the CWA governs significant water bodies with a lasting physical presence, treating them as part of a unified national system rather than isolated, separate waters.

Comparably, in *S. D. Warren*, the Court reinforced that "waters of the United States" maintain their federal status even if they are altered or diverted. *S. D. Warren Co. v. Me. Bd. of Envtl. Prot*., 547 U.S. 370, 386 (2006). The Court rejected the idea that water temporarily removed from a river, stored, or otherwise manipulated somehow loses its designation as national waters and becomes an addition to these waters upon being returned. *Id*. Instead, the Court stated that moving or controlling water does not strip national waters of their protected status under the CWA. *Id*.

Even more, the Supreme Court has ruled that the transfer of polluted water between "two parts of the same water body" does not constitute a discharge of pollutants under the CWA. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 109 (2004) (finding that pumping polluted water from one part of a water body into another part of the same body is not a discharge of pollutants); *L.A. Cnty. Flood Control Dist. v. NRDC, Inc.*, 541 U.S. 78, 109-12 (2013) (holding "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway did not qualify as a discharge of pollutants").

Taken together, these cases support the "unitary waters" approach by interpreting the CWA's purpose in ensuring that significant, permanent water bodies receive comprehensive

protection while facilitating efficient management of interconnected waters. *Raponas* and *S. D. Warren* rulings affirm that waters classified as "waters of the United States" retain their protected status even when relocated or transferred. Likewise, in *Miccosukee* and *NRDC*, the Court determined that transfers between parts of the same water body do not constitute a discharge of pollutants under the CWA. Thus, the phrase "any addition of any pollutant to navigable waters from any point source" means that water transfers within connected navigable waters do not count as a discharge because they involve movement within the same water body. 33 U.S.C. § 1362(12).

2. The EPA's interpretation holds much validity in its reasoning.

The EPA's interpretation is valid because it incorporates the importance of water transfers to the United States's infrastructure and interplay with the CWA purpose. The CWA clearly indicates that Congress did not intend to interfere with state water allocation. The Act states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. 33 U.S.C. § 1251(g).

Similarly, the Act further reinforces Congress's intent that the CWA's NPDES permitting provisions should not affect state control over water allocation. It states:

> Except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States. 33 U.S.C. § 1370.

Therefore, the EPA's stance aligns with the CWA's framework of "cooperative federalism," which maintains that states hold primary responsibility over water allocations within their boundaries. *Catskill III.*, 846 F.3d at 525; *see also S. Side Quarry, LLC,* 28 F.4th at 690. Courts have supported this approach, recognizing the EPA's reasoning in favor of the WTR. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 164, 175 (D.C. Cir. 1982) (determining that changes in

water quality caused by dams do not constitute "additions" because no new pollutants are introduced "from the outside world," and such issues are better addressed through state-managed nonpoint source pollution planning); *Nat'l Wildlife Fed'n v. Consumers Power,* 862 F.2d 580 (6th Cir. 1988) (concluding that the NPDES program was not applicable for managing water diversions, as fish and fish parts released by a hydroelectric plant did not constitute a "discharge of pollutants" since they were already present in the water); *U.S. v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) (holding that when "'pollutants' exist[] in waters of the United States before contact with these facilities, the mere diversion in the flow of waters [does] not constitute 'additions' of pollutants to water"); *Catskill III*, 846 F.3d at 505 (emphasizing the need to create a "balance…between federal and state oversight of activities affecting the nation's waters"). Thus, the NPDES program is not appropriate for water transfers based on the CWA's purpose.

3. The EPA's interpretation has remained consistent with earlier and later pronouncements.

The EPA has also consistently held that transfers of untreated water as part of routine water management activities do not require NPDES permits. *See Gorsuch*, 693 F.2d at 167 (stating the "EPA's construction was made contemporaneously with the passage of the Act and has been consistently adhered to since"). Additionally, more than 40 states have historically not required permits for these water transfers and diversions. *NPDES Water Transfers Rule*, 73 Fed. Reg. 33,697, 33,699 (June 13, 2008).

Considering all the information presented above, the EPA's interpretations possess sufficient persuasive power to remain valid under the *Skidmore* standard. Thus, the district court's decision to grant the EPA's motion to dismiss CSP's challenge to the WTR was appropriate, as the WTR remains a valid regulation.

IV. The district court correctly held that pollutants introduced during the water transfer required permitting under the CWA because additional pollutants were discharged as a result of the water transfer activity itself.

The Twelfth Circuit should affirm the district court's judgment that the introduction of pollutants during the water transfer removes the discharge from the scope of the WTR, thereby subjecting Highpeak's discharge to require a permit under the CWA. The Act prohibits "the discharge of any pollutant by any person" without a permit. 33 U.S.C. § 1311(a). As stated *supra*, a "discharge of a pollutant" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The WTR clarifies that "water transfers" involving "navigable waters" do not require NPDES permits because they do not result in the addition of a pollutant but rather involve the movement of water within "the waters of the United States." 40 C.F.R. 122.3(i)(2023). Yet, the WTR also clarifies that "[t]his exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." *Id.* In other words, "where water transfers introduce pollutants to water passing through the structure into the receiving water, NPDES permits are required." 73 Fed. Reg. at 33,705.

The district court did not err in denying Highpeak's motion to dismiss the citizen suit claims for two independent reasons. First, the EPA's interpretation of its own regulation demands a higher level of respect under the *Auer* standard. Second, even without deference given to the EPA's interpretation, the purpose of the Act and case law support the same interpretation.

A. *Auer* deference allows for a higher level of respect to the EPA's interpretation of its own regulation.

In the absence of the Supreme Court altering or overturning *Auer* deference in *Loper Bright*, the Twelfth Circuit must give deference to EPA's interpretation of its own regulation. A succeeding Supreme Court ruling that conflicts with the rationale of prior circuit decisions does not automatically justify departing from established circuit precedent unless the previous decision

has been explicitly overruled. *U.S. v. Vega-Castillo*, 540 F.3d 1235, 1237 (11th Cir. 2008); *see also File v. Martin*, 33 F.4th 385, 392 (7th Cir. 2022) (rejecting the notion that lower courts are free to declare a Supreme Court precedent has been overruled by implication). Thus, it is not the role of lower courts to determine what remains good law; only the Supreme Court can make that determination.

What's more, *Loper Bright* reasoning has been mistakenly accused of overturning *Auer*. Rather, *Loper Bright's* reasoning ultimately supports the preservation of *Auer*. First, both decisions affirm that agencies may interpret rules if Congress has granted them this authority. *Loper Bright* recognizes that when a statute explicitly grants an agency the authority to interpret its provisions, it inherently provides the agency with discretion to clarify its own interpretations of the statute's meaning. *Loper Bright*, 144 S.Ct. at 2268. This recognition is akin to the principles in *Auer*, which permits agencies to clarify ambiguous regulations based on an implied delegation. *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Both decisions create a basis for an agency's authority to interpret statutory terms when it issues a rule and when it later clarifies or refines the rule's meaning. *Loper Bright*, 144 S.Ct. at 2268; *Auer*, 519 U.S. at 462.

Second, both decisions emphasize that courts should defer to agency interpretations of their own rules, provided those interpretations result from "reasoned decision-making." *Loper Bright*, 144 S.Ct. at 2263. *Loper Bright* states that agencies must engage in "reasoned decision-making" within the constraints of their statutory authorization. *Id*. To support this, it cites *State Farm*, which established the arbitrary-and-capricious review standard. *Id*. In *State Farm*, the Court held that agency actions must be well-reasoned within the "range" of discretion granted by Congress, requiring agencies to consider all relevant factors, provide evidence-based explanations, and avoid overlooking important issues. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*

Co., 463 U.S. 29, 50 (1983). Significantly, this standard of review mirrors the requirements outlined in *Kisor*, where the Court established a framework for applying arbitrary-and-capricious review standards in the context of *Auer* deference. According to *Kisor*, an agency's interpretation must be "reasonable", meaning it should fall within the "outer bounds of permissible interpretation." *Kisor v. Wilkie*, 588 U.S. 558, 575-76 (2019). Moreover, the agency's interpretation must be "authoritative", grounded in its substantive expertise, and it must reflect the agency's "fair and considered judgment." *Id*. at 577-79. Thus, if an agency's interpretation of its own regulation fails under *Kisor's* framework, the agency has also failed to engage in *Loper Bright's* "reasoned decision making" standard.

Finally, both decisions used methods in preserving stability in the administrative law framework on which countless agency actions and judicial decisions are based. *Loper Bright* acknowledged the validity of prior agency interpretations, by not allowing people to relitigate prior holdings upheld under *Chevron*. *Loper Bright*, 144 S.Ct. at 2273. Likewise, *Kisor* refused to overturn *Auer* based on the potential destabilization of administrative law that would result. *Kisor*, 588 U.S. at 589.

Thus, *Loper Bright's* decision, together with *Kisor*, reaffirms the core principles of *Auer* deference. Accordingly, the EPA's interpretation warrants deference in this case. Congress expressly delegated authority to EPA "to prescribe such regulations as are necessary to carry out his functions under" the CWA. 33 U.S.C. § 1361(a). This delegation grants the EPA the authority to interpret statutory terms both when promulgating a rule and when clarifying its meaning. To clarify "pollutants introduced by the water transfer activity itself," the EPA offers a well-reasoned interpretation that NPDES permits would still be required when the transfer introduces pollutants to "water passing through the structure into the receiving water." 40 C.F.R. § 122.3(i)(2023); 73

Fed. Reg. at 33,705. This interpretation is more than just "fair and considerable judgment." *Wilkie*, 588 U.S. at 575-76. It is grounded in the CWA's statutory language prohibiting "the discharge of *any* pollutant" and is further supported strongly in case law, as discussed below. 33 U.S.C. § 1311(a). Therefore, Highpeak's water transfer activities fall outside the scope of the WTR and require a permit.

B. Even without deference given to the EPA's interpretation, the Court shall find a permit is still required under the CWA.

Regardless of whether *Auer's* deference is given to the EPA's interpretation, it is clear from the Act that Highpeak must obtain a permit for the discharge of pollutants into Crystal Stream. The stated objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this, the Act mandates that "the discharge of any pollutant by any person shall be unlawful" unless authorized by a permit. 33 U.S.C. §§ 1311(a); 1342(a). The term "discharge of a pollutant" is defined broadly to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1362(12), (6), (14). Under the Act, a "point source" encompasses "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, … or vessel…, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Read together, the Act does not prohibit the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant *to* navigable waters." *Rapanos*, 547 U.S. at 743 (emphasis added). So, the Act and the Supreme Court have clarified that a point source need not be the original source of the pollutant; it only needs to be the means by which "--but for the point source--the pollutants would have been added to the receiving body of water." *Miccosukee Tribe*, 541 U.S. at 105.

This unambiguous interpretation has been upheld for "any pollutant *that naturally washes downstream*, … even if the pollutants discharged from an artificially human made point source do

not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Rapanos,* 547 U.S. at 743 (emphasis added); *see also Cty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 184 (2020) (explaining that if pollutants are "functionally equivalent" to a direct discharge—considering factors like distance, time, and intervening materials—then the discharge requires a permit under the CWA*)*; *Ecological Rts. Found. v. Pac. Gas & Elec. Co*., 713 F.3d 502, 508 (9th Cir. 2013) (requiring a permit for runoff that is "collected, channeled, and discharged through a" point source); *NA KIA'I KAI v. Nakatani*, 401 F. Supp. 3d 1097, 1108 (D. Haw. 2019) (upholding the need for a permit as the system's "forty miles of unlined, earthen drainage ditches…" added pollutants to the transferred waters due to the drainage system itself).

Here, Highpeak's tunnel constitutes a point source that has consistently discharged, and continues to discharge, pollutants into the Crystal Stream without the required permit. Water samples taken directly from the intake in Cloudy Lake, along with samples from the outfall into Crystal Stream on the same day, confirms that a 2-3% increase of iron, manganese, and total suspended solids (TSS) have been added due to the water transfer activity itself. (R. 5, 12). As Justice Scalia pointed out, the purpose of the CWA does not limit regulation solely to direct introductions of pollutants but also encompasses indirect additions, such as those from naturally occurring processes through an artificially human made point source. *Rapanos,* 547 U.S. at 743.

And like the forty-mile unlined tunnel in *Nakatini* that allowed pollutants, such as groundwater, stormwater runoff, and sediment to be discharged, Highpeak's much shorter partially constructed 100-yard tunnel has allowed pollutants to collect and enter into the water during the transfer process. (R. 4); *Nakatani*, 401 F. Supp. 3d at 1108. Given the significantly shorter length of Highpeak's artificial tunnel, which includes metal piping only in certain sections, the reduced distance and travel time even more strongly supports that the water transfer itself is the cause of

additional pollutants. *Id*. Thus, Highpeak cannot evade liability by attributing these pollutants solely to "natural" erosion, as the erosion in question resulted from the construction and lack of continuous piping in the human-made tunnel that is "functionally equivalent" to a direct discharge. *Haw. Wildlife Fund*, 590 U.S. at 184. Subsequently, Highpeak's pollutant discharges during its water transfer activities require a permit.

CONCLUSION

The judgment of the district court denying the EPA's motions to dismiss on standing and timeliness should be reversed. However, the district court properly denied CSP's challenge to the WTR and Highpeak's motion to dismiss the citizen suit regarding the NPDES permit issue, so these judgments should be affirmed. The Court should find in favor of Appellee EPA on all issues briefed herein.